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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

HARRIET COHEN,

Petitioner,

v.

CITY OF DES PLAINES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The question presented for review is whether prohibiting a commercial day care center in a single-family zoning district violates the Establishment Clause or Equal Protection where a day care center is a permitted use in a church or a private or public school.

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STATUTES
(not set forth by Petitioner)

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105 ILCS 5/10-22.18 (School district powers)

5/10-22.18a. Child care and training centers—Charges—Public aid payments for certain children

§10-22.18a. Child care and training centers—Charges—Public aid payments for certain children. To establish Child Care and Training Centers for children under the age of compulsory school attendance for the purpose of providing them (1) social and educational guidance and developmental aids supplemental to parental care and training designed to assist them in attaining their greatest potential during their school years and adult life and (2) care and services, in addition to the services specified in (1), required because of the absence from home for all or part of the day of their parents or other persons in charge of their care as a result of employment or other reason. The board may also make the facilities of the Centers available before and after as well as during regular school hours to school age and preschool age children who may benefit thereby, including children who require care and supervision pending the return of their parents or other persons in charge of their care from employment or other activity requiring absence from the home.

105 ILCS 5/10-23.2 (School district powers)

5/10-23.2. Nursery schools

§10-23.2. Nursery schools. In all districts maintaining grades 1 to 8 or 1 to 12, to establish nursery schools for the instruction of children between the ages of 2 and 6 years, if, in its judgment public interest requires them and sufficient funds obtained from local and federal sources other than local district taxes are available to pay the necessary expenses thereof; provided, that the school board shall at all times have complete jurisdiction and control

over such schools, including the employment of teachers, attendants and any other employees, and shall have complete control of the expenditure of such funds in connection with the establishment and maintenance of such schools.

225 ILCS 10/2.09 (Licensing provision)

10/2.09. Day care center

§2.09. "Day care center" means any child care facility which regularly provides day care for less than 24 hours per day for (1) more than 8 children in a family home, or (2) more than 3 children in a facility other than a family home. The term does not include (a) programs operated by public or private elementary school systems or secondary level school units or institutions of higher learning which serve children who shall have attained the age of 3 years.

ZONING ORDINANCES

(Definitions)

1.2.17 *DAY CARE CENTER*: A specifically designed, reconstructed or remodeled structure other than a single-family residence simultaneously occupied by a single family, and licensed by the State of Illinois, providing day care services for compensation for more than eight (8) children during the day. (Amended May 20, 1974—Z-6-74.)

3.1.2 *USE REGULATIONS*: A building or premises shall be used only for the following purposes:

3.1.2.2 Public schools, elementary and high or private schools having a curriculum the same as ordinarily given in a public elementary or high school, and having no rooms regularly used for housing or sleeping purposes; colleges, junior colleges, or universities.

* * *

STATEMENT OF THE CASE

Petitioner's statement of the case contains the following misstatements:

1. Petitioner states:

> Thus, the Des Plaines zoning regime allows an unlimited number of day care centers located in churches or other religious facilities to operate without a special use permit. All others seeking to open day care centers outside religious facilities must comply with the strictures of the zoning ordinance.

The ordinance allows public and private schools (Section 3.1.2.2) and allows day care centers in connection with those schools. (See detailed discussion Point II of this answer.)

2. Petitioner states, when referring to the Trial Court decision:

> The court also found that at least one center operating in a residential zone was owned by a for profit corporation, and that all of the centers appeared to be essentially commercial ventures even though located on church property.

The Trial Court stated, however, (Page D-7 of the Petition):

> Cohen lists seven day facilities that *she claims* operates religiously-affiliated buildings in areas zoned for residential use. Four of them are located in R-2 single-family districts, one is in an R-4 multiple-family district and two are in R-5 multiple-family districts. *According to Cohen* each of those facilities charges a fee for the services it provides, advertises in the local yellow pages and operates with a license from the State as a day care center. (Emphasis added.)

The statement then refers to Note 14 where the Court states:

> Although the fact that the yellow pages list the facilities as "nursery schools" is irrelevant as to how the ordinance would classify those facilities, it certainly is relevant to *Cohen's claim* that those facilities are essentially commercial ventures even though located on church property. (Emphasis added)

Thus, counsel's quote does not relate to a Trial Court finding, it relates to his client's claim.

ARGUMENT

I.
INTRODUCTION

In Rule 10 of this Court it is indicated that the primary considerations in connection with a petition for writ of certiorari are conflicts with decisions of a United States Court of Appeals, a State Court of last resort, or a decision of this Court.

None of the decisions cited or argued by Petitioner indicate any conflict with the unanimous decision of the Circuit Court of Appeals in this case. (*Cohen v. City of Des Plaines*, 8 F.3d 484 (7th Cir. 1994)).

Petitioner would have this Court overrule the decision of the Circuit Court of Appeals by arguing in the introduction that church operated day centers are really commercial ventures operated on church premises because the day care centers are advertised in the yellow pages. It is an interesting theory that a church becomes a business and loses its First Amendment protection by placing an adver-

tisement in the yellow pages or in a newspaper. This Court can take judicial notice under Rule 201 that such advertising by churches of its religious services is hardly unusual. Justice Brennan in his concurring opinion in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327 (1987), clarifies the difference between commercial enterprises and a non-profit church operated enterprise as follows:

> In contrast to a for-profit corporation, a non-profit organization must utilize its earnings to finance the continued provision of the goods or services it furnishes, and may not distribute any surplus to the owners. See generally Hansmann, The Role of Nonprofit Enterprise, 89 Yale L.J. 835 (1980). This makes plausible a church's contention that an entity is not operated simply in order to generate revenues for the church, but that the activities themselves are infused with a religious purpose. Furthermore, unlike for-profit corporations, nonprofits historically have been organized specifically to provide certain community services, not simply to engage in commerce. Churches often regard the provision of such services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster. (Page 346)

Justice Brennan's comment that "the activities themselves are infused with a religious purpose" is particularly true when a church is involved with educating and caring for young people. Thus, the Circuit Court of Appeals in this case held:

> History and common sense teach that the care and education of young children fall within the mission of most, if not all, religious organizations. Sunday schools provide one obvious example of the way churches minister to pre-school youth. (*Cohen v. City of Des Plaines*, 8 F.3d 484 at page 492.)

II.

THE DES PLAINES ZONING ORDINANCE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

Analysis of the Decisions Cited by Petitioner

1. ***Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327 (1987).**

In *Amos* this Court unanimously determined that the exemption from the Federal Civil Rights Act allowing churches to restrict their employees to members of the church's faith was constitutional as applied to a church gymnasium. The Deseret gymnasium in the *Amos* decision was a secular operation open to the public but run by the church. This is directly analogous to the church day school permitted under the Des Plaines zoning ordinance.

Justice White in the *Amos* opinion dealt specifically with Petitioner's argument in this case that the Des Plaines ordinance confers a benefit upon church operated child care facilities that is unavailable to others:

> We find unpersuasive the District Court's reliance on the fact that §702 singles out religious entities for a benefit. Although the Court has given weight to this consideration in its past decisions, see n. 11, *supra*, it has never indicated that statutes that give special consideration to religious groups are *per se* invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause. See *supra*, at 2867-2868. Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities.

2. *Texas Monthly Inc. v. Bullock*, 489 U.S. 1, 109 S.Ct. 890 (1989).

In *Bullock* this Court held that a Texas tax exemption applicable to the sale of religious literature violated the Establishment Clause. *Bullock* is not relevant to the Des Plaines ordinance for the following reasons:

A. The statute in *Bullock* put the Court in the position of having to examine on a pamphlet-by-pamphlet basis what was religious and what was secular. Under the Des Plaines ordinance no such examination is necessary as the day care centers operated by the church are non-sectarian.

B. *Bullock* involved a tax subsidy to the church that automatically placed an additional tax burden on non-religious sellers of pamphlets or the purchasers thereof. No such tax burden is involved under the Des Plaines ordinance.

C. The *Bullock* statute was not authorized by this Court's decision in *Walz v. Tax Commissioner*, 397 U.S. 664, 90 S.Ct. 1409 (1970), because the tax exemption in *Walz* extended to non-religious organizations. The zoning exception under the Des Plaines ordinance applies not only to religious uses but also exempts public schools, elementary and high or private schools having a curriculum the same as ordinarily given in a public elementary or high school; colleges, junior colleges or universities. (Section 3.1.2.2 of the Des Plaines zoning ordinance. Footnote 7 in the Circuit Court of Appeals decision, 8 F.3d 494 and *supra* page 2.)

D. There is no indication in this Court's decision in *Texas Monthly, Inc. v. Bullock* of an intent to limit the unanimous decision in *Amos*. Thus, it is stated

in the concurring decision of Justices Blackmun and O'Connor:

> Although some forms of accommodating religion are constitutionally permissible (See *Corporation of Presiding Bishop v. Amos*) this one surely is not. (*Bullock*, 489 U.S. at 28.)

The Des Plaines ordinance does not grant tax relief or a subsidy to the church. It simply allows a customary ancillary use.

3. *Mueller v. Alan*, 463 U.S. 388, 103 S.Ct. 3062 (1983).

Mueller v. Alan involved a Minnesota statute which allowed state taxpayers to deduct from income taxes expenses incurred in providing "tuition, text books and transportations" for their children attending elementary or secondary schools. (Page 388) A taxpayer's suit was brought alleging that the payment of tuition was a direct benefit to parochial schools. Petitioner quotes the following from *Bullock* where *Bullock* discusses *Mueller*:

> In *Mueller* the court 'deemed it particularly significant that the deduction is available for educational expenses incurred by all parents including those whose children attend public schools and those whose children attend non-sectarian, private or sectarian private schools.' (*Bullock*, 489 U.S. at 12; *Mueller*, 463 U.S. at 397.)

It is difficult to comprehend Petitioner's reliance on this quote from *Mueller* because the Des Plaines zoning ordinance not only allows day care centers for churches, but day care centers are allowed for public and private schools as well. As the ordinance provides that property may, without any special permission from the City, be used for the following uses, among others:

> 3.1.2.2: Public schools, elementary and high or private schools having a curriculum the same as ordi-

narily given in a public elementary or high school; colleges, junior colleges or universities.

The School Code (Ill.Rev.Stat. ch. 122, paras. 10-22.18(a) and 10-23.2 (1991) now 105 ILCS 5/10-22.18 and 23.2), specifically allows public schools to operate child care and training centers and nursery schools. (See Footnote 7 of the Circuit Court of Appeals decision, 8 F.3d at page 494 and *supra* pages 1, 2.)

Day care centers are also authorized as an incidental use for private elementary schools as those schools, along with public schools, are excluded from the State of Illinois day care licensing statute, Ill.Rev.Stat. ch. 23, para. 2212.09 (1991), now 225 ILCS 10/2.09 (See *supra* page 2), and the Des Plaines ordinance exempts day care centers exempt from the State licensing provision. Ordinance sec. 1.2.17. (See *supra* page 2.)

Thus, *Mueller* supports the decision of the Circuit Court of Appeals in this case.

III.

THE SINGLE-FAMILY RESIDENTIAL CLASSIFICATION OF THE DES PLAINES ORDINANCE DOES NOT DENY PETITIONER EQUAL PROTECTION

The Des Plaines zoning ordinance prohibits business uses in its single-family zoning district. Ever since such a zoning classification was sustained by this Court in *Euclid v. Ambler Realty*, 272 U.S. 265 (1926), this has not been a revolutionary doctrine. Petitioner alleges, however, that a church operated day care center allows the same undesirable conditions as a day care center operated as a business, including the potential for excessive traffic, noise and congestion.

Petitioner overlooks, however, that communities may use as a factor in their zoning classifications the benefits

that some uses confer upon the community. The difference is pointed out in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. at 342:

> In contrast to a for-profit corporation a non-profit organization must utilize its earnings to finance the continued provisions of the goods or services it furnishes and may not distribute any surplus to the owners.

The reasonableness of this classification is supported by the Illinois Supreme Court in a decision not involving a religious use. In *City of Champaign v. Roseman*, 15 Ill.2d 363, 155 N.E.2d 34 (1958), the Illinois Supreme Court dealt with the weighing of benefits that a use may provide in holding that it was permissible to permit physicians' and surgeons' offices in a zoning district if connected with hospitals or clinics but not permissible in a separately established doctor's office. The Illinois Supreme Court stated:

> Defendants urge that a physician's and surgeon's office is no more detrimental to public health, safety or welfare than the permitted uses under the ordinance. Their particular target is the provision permitting "hospitals and clinics" used for the diagnosis and treatment of human ills, while denying them the use of their property for the same purpose. We think the difference is apparent. Hospitals, whether privately or publicly owned, are institutions operated largely for the benefit of the community by the care and treatment of bed patients. 15 Ill.2d at 366.

Without regard to the religious question, conditioning an ancillary use on the basis of the desirability of the principal use is, according to the Illinois Supreme Court, a "rational" decision.

The Circuit Court of Appeals in this case also points out:

> First, allowing churches to provide child care and educational services coheres with the religious mis-

> sions of most churches and thus implicates rights protected by the Free Exercise Clause. This country has long recognized the right of religious organizations to educate their youngest members. (Page 492)

The removal of a potential burden on the free exercise of religion is an additional reason why the classification is not a violation of equal protection.

Public schools, including day care centers, are also a permitted use in the Des Plaines single-family zoning classification. A public high school customarily brings undesirable elements to a single-family zoning district particularly in connection with athletic events and parking. Public schools often provide food services, however, allowing food service uses by a school that serves the community does not mean that a McDonalds restaurant has to be allowed in a single-family zone.

CONCLUSION

Respondent therefore requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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